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In The
Supreme Court of the United States

NORMAL PARM, JR., et al.,

Petitioners,

v.

MARK SHUMATE, in his official capacity as Sheriff of East Carroll Parish, Louisiana,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF *AMICI CURIAE* OF A COALITION OF CONSERVATION, WILDLIFE, FISHING AND WETLANDS ORGANIZATIONS LED BY RESTORE OUR WATER ACCESS, INC., IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Can the public's right to fish the navigable waters of the United States – as delimited by the mean high water mark and in view of seasonal or regular flooding – be restricted under the Privileges or Immunities Clause, the equal footing and federal navigational servitude doctrines, and federal common law?

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BRIEF *AMICI CURIAE* OF A COALITION OF CONSERVATION, WILDLIFE, FISHING AND WETLANDS ORGANIZATIONS LED BY RESTORE OUR WATER ACCESS, INC., IN SUPPORT OF PETITIONERS

Restore Our Water Access, Inc. (hereinafter "ROWA"), respectfully submits the following brief as *amici curiae* on behalf of a coalition of conservation, wildlife, fishing and wetlands organizations, in support of petitioners, Normal Parm, Jr. et al.[1]

INTEREST OF *AMICI CURIAE*

1. *Institutional Profiles of Selected* Amici.

a. *Restore Our Water Access, Inc.* ROWA,

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[1] Pursuant to S. Ct. R. 37.2(a), petitioners and respondent received timely notice of the intent to file this brief, and all parties have consented to the filing of the brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *Amici Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, or its counsel, made a monetary contribution to its preparation or submission.

A complete list of the members of the coalition of organizations supporting this filing appears in the Appendix to this brief.

organized in 2005, is a not-for-profit organization established to restore the rights of Louisiana citizens to access and lawfully use public waters. These rights predate statehood and have been enforced for decades, contributing to Louisiana's rich cultural history and outdoor heritage. More recently, however, laws and court rulings contrary to the constitutional and common law underpinnings of traditional public access rights have encroached upon and, in some cases, dramatically curtailed public access to public waters. ROWA's organizational members include the Louisiana Bass Federation Nation, the Fisheries Policy & Management Committee of the Louisiana Wildlife Federation, St. Bernard Sportsmen's League, East Ascension Sportsman's League, Louisiana Sportsman magazine, Waterways Access Association, and PAWRA, some of which are members of the coalition supporting this brief (see Appendix).

Thus far, working with other groups and the Louisiana Legislature, ROWA has succeeded in having the Louisiana State Land Office post its waterbottom ownership maps on the Internet. ROWA will be pursuing additional strategies to resolve public access questions and disputes in coastal waters.

b. *B.A.S.S. Federation Nation and The Bass Federation, Inc.* Although B.A.S.S. Federation Nation ESPN and The Bass Federation, Inc. are now distinct organizations, they share a common mission and purpose and a history dating back 35 years.

B.A.S.S. Federation Nation, with its state chapters (and overseas affiliates), in association with ESPN, has been a community united by a sense of

camaraderie and a spirit of belonging to something unique that carries from generation to generation: the love of sport-fishing and the protection of the natural environment for all Americans. B.A.S.S. Federation Nation sponsors state-wide qualifying tourneys, leading to divisional competition, and culminating in the premier events of bass fishing: the annual Federation Nation Championship, the Bassmaster Classic, and the Bass Club World Championship.

In addition to the sponsorship of exciting tournament fishing, B.A.S.S. Federation Nation has established conservation and youth program initiatives as areas critical to the viability of the sport and our national outdoors lifestyle. In recognition of its members' dedication to the preservation of the sport's natural resources, conservation features and initiatives include: (1) a Federation Nation Stewardship Program linked to National Fish Habitat Action Plan and the "More Fish" Initiative, providing a minimum of $1,000 annual endowment to each state Federation Nation for fish habitat work; and (2) establishment of the B.A.S.S. Federation Nation Conservation College Scholarship Program, offering a variety of four-year and two-year scholarships in undergraduate and graduate awards for students pursuing fisheries and biology studies.

The Bass Federation, Inc. (TBF), is the oldest and largest organized grassroots fishing, youth and conservation organization in the United States with over 1900 clubs, 30,000 members and 46 affiliated federations. TBF has formed a new "Partnership in Fishing" with FLW Outdoors, the largest marketer and promoter of fishing tournaments in the world. TBF

also has among its ranks a fishing program in 35 universities and colleges nationwide, a large youth club membership base and will soon fully launch the TBF National Youth Education program into the public school systems nationwide in the United States. The program will promote fishing, conservation and the outdoors experience.

In 2007, TBF and its affiliates conducted 20,000 fishing and conservation-related events in the U.S. Also in 2007, through its partnership with FLW Outdoors, and its sponsor partners, $52,000 was awarded in TBF state federation conservation grants, for projects such as public\boater access, erosion control, fish release boats, forage stockings, and habitat enhancement. These grants were generally matched 3:1 with federal funds for the individual projects.

c. *State Wildlife and Conservation Federations.* The state Wildlife and Conservation Federations represented here (from nearly ten states) are united in their mission to educate, inspire, and empower individuals and organizations to take action to conserve and to support the sustainable harvest and wise use of fish, game, wildlife, forest and other natural resources, to help protect our planet's environment, and to nourish an ethic of stewardship and enjoyment of our natural world. From hunters to bird-watchers, teachers to backpackers, gardeners to farmers, these state federations have established themselves as umbrella organizations representing various interests and are committed to building partnerships that help ensure that our children and grandchildren enjoy the same natural heritage and opportunities for outdoor

recreation.

Many of these state organizations have been operating continuously since the beginning of the conservation movement in the early twentieth century, and have been responsible for many state-based and national legal and policy initiatives for the promotion of best practices for hunting and angling, and the preservation of the natural environment (including those associated with navigable waters and wilderness areas). Depending on the size and population of the state represented, these wildlife and conservation membership organizations represent the interests of hundreds of thousands of individuals. Many of these state organizations are involved in research and publication efforts, the maintenance of charitable endowments for conservation purposes, and legal and policy action to ensure continued public access to water and wilderness areas.

2. *The Common Interests of this Extraordinary Coalition.* This broad array of institutional and individual *amici* represents every aspect of outdoor recreational constituencies: national, regional and local interests in the areas of conservation, wildlife management, sport and recreational fishing, and wetlands science. The *amici* coalition has broad experience with, and an interest in, the rational management of the nation's navigable waters, the conservation of the resources of those waters, and open access to the public for purposes of fishing, hunting, bird-watching, canoeing and kayaking, wildlife observation, and communing with nature.

The *amici* coalition represents virtually every

federal judicial Circuit, as well as reflecting the national interests associated with the uses of this country's navigable waters. They also come from every State bordering the Mississippi River, the rights to access of which are the subject of this petition. These organizations have, collectively, tens of thousands of members and reflect broad public constituencies. *Amici* coalition quite literally represent the public interest in public access to the navigable waters of this nation.

This petition concerns rights of the public – under federal and state law – to traverse navigable waters for purposes of recreational and sport fishing and related activities. *Amici* coalition will focus here exclusively on the federal law aspects of the public's right of access to the navigable waters of this country, particularly (1) the federal constitutional and common law aspects of rights to access to navigable waters, including the equal footing doctrine, the Privileges or Immunities Clause, see U.S. CONST. Amend. XIV, § 1, and related principles; (2) any relevant federal statutory authority bearing on rights of access; and (3) federal law characterizations of the activities at issue here (whether fishing can be assimilated to commerce) and the nature of property at question in this case (whether flood-lands assimilated to navigable waters have impressed upon them a public right of access).

It would be difficult to calculate the exact number of Americans who regularly engage in sports and recreational angling, who kayak and paddle on the nation's navigable waters, and those who hike, bird-watch or commune with nature in proximity to such waters, but such would have to be conservatively

estimated in the several millions of individuals. At issue in this petition is continued access to the navigable waters of the United States for these legitimate purposes and activities, particularly fishing. In response to efforts to "enclose" the national recreational "commons," this brief *amici curiae* is addressed.

ARGUMENT

THIS COURT'S REVIEW IS NECESSITATED BECAUSE THE DECISION BELOW ENCLOSES A LARGE PART OF THE WATERS OF THE UNITED STATES AND CONTRAVENES THE INTERESTS OF MILLIONS OF RECREATIONAL BOATERS AND ANGLERS

The nub of petitioners' claim is that they have a right of recreational and commercial use of the waters of the United States for fishing, when those waters are associated with otherwise navigable waterways and are situated below the mean high water mark, as determined by applicable legal standards. See Pet. App. 14. Private landowners underlying such waters have no right to exclude the public during the time they are in a normal flood stage, and, therefore, Respondent was not acting lawfully in arresting members of the public, including petitioners, for trespass. See id. As the court below recognized, the essential issue here is whether petitioners "have . . . a federal . . . right to fish on [waters overlying property] in the spring during the Mississippi River's normal flood stage." Id.

The Fifth Circuit, in the opinion for which review is sought here, concluded that any federal navigational servitude implicated in this case is strictly limited to commercial purposes, and "recreational" fishing is thus not a protected interest under federal law. See id. at 16 ("Neither navigation nor commerce encompasses recreational fishing." (citing *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482-84 (1988)). This holding profoundly distorts the scope of the federal navigational servitude and its proper relationship with principles of state property law. The Fifth Circuit's holding also blithely ignores the relevance of a federal constitutional guarantee of access to the waters of the United States for recreational fishing, a right enshrined in the Privileges or Immunities Clause of the Fourteenth Amendment.

Taken together, the decision below creates an awesome change in public expectations of access to the waters of the United States for purposes of recreational fishing and other sporting and conservation activities. Access to waters that are in normal flood stage (as the properties at issue in this case unquestionably are) will cease, as landowners seek to enclose them, even though such waters are obviously accessed from navigable channels. Law enforcement entities will, as here, be suborned to exclude the public under threat of trespass. If left unreviewed, the Fifth Circuit's decision will galvanize the greatest enclosure initiative ever seen in relation to the waters of the United States. It will result in the diminution of the great fishing and recreational commons of this nation and the incalculable loss of areas of public access for fishing,

paddling, nature observation, and countless other activities.

I. The Fifth Circuit's decision is in irreconcilable conflict with those of state supreme courts and of this Court in regards to the scope of the public's right of recreational enjoyment of the waters of the United States.

Review of the Fifth Circuit's decision is necessitated because it results in an extraordinary dissonance between federal courts' construction of the scope of the federal navigational servitude and its application under the jurisprudence of many states in the nation. Additionally, the decision below is simply irreconcilable with the jurisprudence of this Court, which has given a broad ambit to the federal navigational servitude and certainly has never constricted it in relation to activities which can be regarded as recreational, especially sport fishing.

A. The Fifth Circuit's decision conflicts with that of the supreme courts of at least twelve states, all of which have recognized a right to fish and recreational use the waters of the United States.

While the court below properly recognized that the modalities of regulation of public trust lands are dictated by state property-law, see Pet. App. 17 (citing *Phillips Petroleum*, 484 U.S. at 482-84), and ostensibly disclaimed the need for "adopting a federal rule of decision in this context," Pet. App. 18, the panel's

opinion deliberately ignored the great weight of state property-law jurisprudence that has accepted that recreational fishing is a protected value and use of public trust lands. See Pet. App. 18 n.5 ("Plaintiffs point us to state court decisions that provide citizens with a right to fish on navigable waters. But those cases merely prove that states generally regulate the use of public trust lands."). With great respect to the court below, it is well settled – as a matter of state property-law – that included within the ambit of public trust lands and the federal navigational servitude is the right of the public to recreationally fish on waters below the federal normal high water mark. While other aspects of public trust rights may remain in doubt, see *Shively v. Bowlby*, 152 U.S. 1, 26 (1894) ("there is no universal and uniform law upon the subject; but ... each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy"), this one is not.

The highest courts of Louisiana and Mississippi (the two states relevant to the Fifth Circuit's decision on the character of flood-lands for the Mississippi River), have conclusively held that rights of recreational boating and fishing (sometimes referred to in these cases as a right of piscary) are held by the public. See *State v. Barras*, 615 So.2d 285, 288 (La. 1993) ("The public has a traditional right to fish from boats in the navigable waters of the state."); *Ryals v. Pigott*, 580 So.2d 1140, 1152 (Miss. 1990) ("Those waters are navigable in fact which are navigable by loggers, fishermen and pleasure boaters.").

This proposition has been repeated in the

jurisprudence of many states, and precisely in the context raised here – public fishing and boating access to waters that are below mean high water. See, e.g., *Delinks v. McGowan*, 173 A.2d 488, 491 (Conn. 1961); *Thiesen v. Gulf, F. & A. Ry. Co.*, 78 So. 491 (Fla. 1917) ("The title to the soil under . . . [the] navigable waters, between high and low water mark is in the state of Florida subject to the powers of Congress to regulate commerce. The title to such land, however, is held by the state in trust for the people who have the rights of navigation, fishing, bathing, and commerce upon and in the waters."); *Butler v. Attorney General*, 80 N.E. 688, 689 (Mass. 1907) (all land titles "subject, however, as to that portion between high and low water mark, to the easement of the public for the purposes of navigation and free fishing and fowling"); *Glass v. Goeckel*, 703 N.W.2d 58, 64 (Mich. 2005) ("This rule – that the sovereign must sedulously guard the public's interest in the seas for navigation and fishing – passed from English courts to the American colonies, to the Northwest Territory, and, ultimately, to Michigan.") (citing *Shively v. Bowlby*, 152 U.S. at 11); *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 52 (N.J. 1972) ("The original purpose of the [public trust] doctrine was to preserve for the use of all the public natural water resources for navigation and commerce, waterways being the principal transportation arteries of early days, and for fishing, an important source of food.") (citing and quoting *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452 (1892)); *Gwathmey v. State Through Dept. of Environment, Health, and Natural Resources Through Cobey*, 464 S.E.2d 674, 680 (N.C. 1995) ("all . . . waters,

whether sounds, rivers, or creeks, which can be navigated by sea vessels, are called navigable, in a technical sense, are altogether *publici juris*, and the soil under them cannot be entered and a grant taken for it under the entry law. In them, too, the right of fishing is free.")(citing *Collins v. Benbury*, 25 N.C. 277 (1842)); *Tiffany v. Oyster Bay*, 136 N.E. 224, 224 (N.Y. 1922) (the public has long enjoyed rights "general in their character, as yet not defined with accuracy beyond the ownership and regulation of oyster beds and some general aid to commerce, navigation, fishing or bathing"); *Shrunk v. Schuylkill Nav. Co.*, 14 Serg. & Rawle 71 (Pa. 1826); *Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1041 (R.I. 1995) ("The public-trust doctrine holds that the state holds title to all land below the high-water mark in a proprietary capacity for the benefit of the public. In benefiting the public, the doctrine preserves the public rights of fishery, commerce, and navigation in these waters."); *Caminiti v. Boyle*, 732 P.2d 989, 993 (Wash. 1987) (grants of land made "subject only to the paramount public right of navigation and the fishery.").

The decision below thus creates an insuperable conflict between a federal appeals court (the jurisdiction of which extends to the lower reaches of the Mississippi) articulating a narrow scope of the federal navigational servitude and precluding recreational boating and fishing activities, and a large number of state supreme courts that have decided that angling is just such a protected interest in public trust waters. Ultimately, of course, the scope and nature of the federal navigational servitude and public trust doctrine

is a matter of federal law. It is incumbent on this Court to ensure a consistency of application, especially in defining the extent of the servitude and trust. Left unreviewed, the Fifth Circuit's decision will result in untold confusion among lower courts required to choose between a narrowing construction of the public's right to access to waters (as in the decision below) and more expansive, historically consistent, and doctrinally faithful applications of such rights by state courts.

B. The opinion below also conflicts with the rulings of this Court establishing the equal footing doctrine for waters and recognizing the public's rights to fish up to normal high water.

1. The Fifth Circuit's decision also subverts a venerable tenet of American jurisprudence for public lands, one inherited from English common law and constitutional rights: the sovereign (whether the King, or the state) cannot convey title in lands in such a way as to derogate the public's rights and interests. In this case, the right of recreational boating and fishing has been long-recognized by this Court.

In *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842), the Court, Chief Justice Taney writing, observed:

> [Can the King] grant to a subject a portion of the soil covered by the navigable waters of the kingdom, so as to give him an immediate and exclusive right of fishery, either for shell-fish or floating fish, within the limits of his

> grant[?] [T]he question must be regarded as settled in England, against the right of the king, since Magna Charta, to make such a grant.
>
> The dominion and property in navigable waters, and in the lands under them, being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his care for the common benefit. In such cases, whatever does not pass by the grant, still remains in the crown, for the benefit and advantage of the whole community. Grants of that description are, therefore, construed strictly; and it will not be presumed, that he intended to part from any portion of the public domain, unless clear and especial words are used to denote it.

Id. at 410-11 (citing *Blundell v. Catterall*, 106 Eng. Rep. 1190, 5 Barn. & Ald. 268, 287-309 (K.B. 1821); *The Duke of Somerset v. Fogwell*, 108 Eng. Rep. 325, 5 Barn. & Cres. 875, 883 (K.B. 1826)). See also *Smith v. Maryland*, 59 U.S. (18 How.) 71, 75 (1855) ("The State holds the propriety of this soil for the conservation of the public rights of fishery thereon. . . ."); *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452 (1892) ("title [is] held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of

private parties.").

Since the time of *Martin*, it has been beyond cavil that "the public and common right of fishing in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders," 41 U.S. at 414, is not to be lightly presumed to have been arrogated. These foundational principles, derived from English common and constitutional law, also undergird this Court's fashioning of the "equal footing" doctrine, under which all States admitted to the Union, receive a statutory grant of public trust lands, especially to the surface and beds of navigable waters. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203-04 (1999) ("the 'equal footing doctrine' [is] the constitutional principle that all States are admitted to the Union with the same attributes of sovereignty . . . as the original 13 States.") (citing *Coyle v. Smith*, 221 U.S. 559 (1911)); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997) ("The principle which underlies the equal footing doctrine and the strong presumption of state ownership is that navigable waters uniquely implicate sovereign interests.").

By narrowing the federal navigational servitude, and the attendant public trust doctrine, to only those waters capable of commerce – and thus precluding recreational boating and fishing from the scope of trust lands – the Fifth Circuit's decision places the entire structure of this area of law at risk of substantial incoherence. The federal navigational servitude, under the Fifth Circuit's analysis, would no longer be

connected with sensible standards for navigability. See *Kaiser-Aetna v. United States*, 444 U.S. 164, 171-75 (1979).[2]

2. The decision below also profoundly misapprehends the proper role of federal law in establishing the contours of navigational servitudes and public trust lands, in conjunction with relevant state property-law principles. Dismissive of a "purported federal common law" on this subject, Pet. App. 18 n.5, and disavowing "a federal rule of decision in this context," id. at 18, the Fifth Circuit's decision nevertheless manages to surreptitiously impose a federal rule – but the incorrect one in regard to defining the scope of navigability in relation to pleasure craft, and the wrong technical standard in defining the mean high water (MHW) mark on the navigable waters of the United States as precluding regular seasonal flooding.

While the Fifth Circuit acknowledged, Pet. App. 15, the relevant statutory and regulatory language – the federal navigational servitude extends "laterally to

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[2] Although it is an analytically distinct question, this Court has indicated that in an assessment of navigability for purposes of invoking federal admiralty jurisdiction, U.S. CONST. art. III, § 2, cl. 1, the fact that the vessels and activities implicated were recreational in character does not preclude a finding of navigability and of invoking federal jurisdiction. See *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 670 n.2, 673 (1982) (allowing federal jurisdiction for incident involving "an 18-foot pleasure boat and a 16-foot recreational fishing boat," on a "river [location that was seldom], if ever, used for commercial traffic.").

the entire water surface and bed of a navigable waterway, which includes all the land and waters below the ordinary high water mark;" 33 C.F.R. § 329.11(a) – it inexplicably appeared to ignore that the waters at issue in this case indeed qualified. See Pet. App. 15 (noting that Louisiana defines "ordinary high water" to include 10-year seasonal flood areas). So far from extolling virtues of federalism, the Fifth Circuit actually substitutes its judgment for that of the Louisiana Supreme Court, see *DeSambourg v. Bd. of Comm'rs Grand Prairie Levee Dist.*, 621 So.2d 602, 612 (La. 1993), in defining the spatial scope of the navigational servitude and public trust lands in this case. See 33 C.F.R. § 329.3 (the precise definitions of "navigable waters of the United States" are dependent on judicial interpretation).

Indeed, there appears to be substantial confusion among federal appeals courts as to whether the navigational servitude burdens lands that are regularly submerged at flood stage. Language in this Court's decision in *Oklahoma v. Texas*, 260 U.S. 606 (1923), is suggestive that areas "overflowed in *exceptional instances* when the river is at flood," id. at 632 (emphasis added), are not within the servitude, although river beds that are subject to regular, seasonal flooding are. See id. ("When we speak of the bed we include all of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course."). Indeed, the current regulatory articulation of the spatial extent of the federal navigational servitude has eliminated any exclusion for lands subject to regular or seasonal

flooding, a fact that has been noted by other courts of appeals. See *United States v. Harrell*, 926 F.2d 1036, 1041 & n.19 (11th Cir. 1991) (citing the earlier version of the regulation, 33 C.F.R. § 209.260(j)(i) (1977)).

While all of this seems like an arcane debate, one more worthy of being featured in a case subject to this Court's original jurisdiction, it should be remembered that this Court has traditionally exercised its wise discretion in granting review for cases that implicate the extent and scope of the federal navigational servitude and similar questions in delimiting the "ordinary high water mark," no matter how "technical" in nature. See *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372 (1977); *Hughes v. State of Washington*, 389 U.S. 290 (1967); *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935).

At stake here is not only a significant determination as to the spatial extent of the federal navigational servitude and state public trust lands, but also an even weightier issue of the interplay of state property-law in federal servitude/trust questions. This Court made clear in *Corvallis Sand* that state property-law was normally to be respected, but only insofar as pre-existing federal rights were preserved. See 429 U.S. at 379-80. In the decision below, the Fifth Circuit managed to turn this rule of construction on its head: state property-law rules (concerning the delimitation of the ordinary high water mark in relation to seasonal flooding) were ignored, even while the public's rights of access were derogated.

II. This case offers a superior vehicle for the Court's examination of the modern relevance of the Privileges or Immunities Clause of the Fourteenth Amendment in the context of such established rights of national citizenship as fishing on the waters of the United States.

Briefed below, see Appellant's Orig. Br. 29-31; Appellant's Reply Br. 12-14, but left unaddressed by the Fifth Circuit, is the question of whether a right of access by the public to the waters of the United States is a right of national citizenship guaranteed by the Privileges or Immunities Clause of the Fourteenth Amendment. See U.S. CONST. Amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

This Court has consistently accepted that the Fourteenth Amendment's Privileges or Immunities Clause continues to have modern relevance, despite the narrowing construction given to that provision by the majority opinion of this Court in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). In one recent case, this Court confirmed that aspects of the right to travel are guaranteed under the Clause, insofar as "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bonâ fide residence therein, with the same rights as other citizens of that State." Id. at 80. See *Saenz v. Roe*, 526 U.S. 489, 503-04 (1999). Likewise, it has been noted that rights of federal citizenship are protected under the Clause and "[l]ater cases only reinforced the idea

that there are such incidents of national citizenship." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 843-44 (1995) (Kennedy, J., concurring) (citing *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922); *United States v. Classic*, 313 U.S. 299 (1941); *United States v. Guest*, 383 U.S. 745 (1966); *Shapiro v. Thompson*, 394 U.S. 618 (1969)). "That federal rights flow to the people of the United States by virtue of national citizenship is beyond dispute." Id. at 844.

The *Slaughter-House* decision expressly indicates that access to the waters of the United States is just such a right of national citizenship. See 83 U.S. (16 Wall.) at 79-80 ("The right to use the navigable waters of the United States, however they may penetrate the territory of the several States. . .are dependent upon citizenship of the United States, and not citizenship of a State."). And while this Court has held that access to state game licenses by out-of-state residents is not a right guaranteed by the Privileges or Immunities Clause, see *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 388 (1978), the majority was careful not to extend this ruling to fishing on the navigable waters of the United States. See id. at 373 & n.5; 393 (Burger, C.J. concurring) ("nor may [a state] allocate access to its wildlife in a manner that offends the Fourteenth Amendment.") (citing *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948)). In an earlier decision, *Toomer v. Witsell*, 334 U.S. 385 (1948), this Court struck down a South Carolina statute requiring non-residents to pay license fees for shrimping 100 times as great as residents. See id. at 398-99.

The Fifth Circuit's decision is thus in implicit tension with those of other federal courts of appeals that have sustained section 1983 actions against state officials purporting to enforce state laws (including, presumably, trespass actions) against individuals exercising their rights to fish as guaranteed under the Fourteenth Amendment's Privileges or Immunities Clause. See *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84 (2d Cir. 2003). These cases have indicated that beyond the idea that fishing on the navigable waters of the United States is an incident of national citizenship, the Privileges or Immunities Clause is intended to promote those rights that are "sufficiently basic to the livelihood of the Nation" and that "bear[ ] upon the vitality of the Nation as a single entity." *Baldwin*, 436 U.S. at 383, 388; see also *Toomer*, 334 U.S. at 395-96.

While *amici* carry no brief for those who would repatriate the "Constitution in Exile," and who would wholesale resurrect the Fourteenth Amendment's Privileges or Immunities Clause as a new bulwark of liberty, this case does present an opportunity for the Court to examine one particular aspect of rights of national citizenship. That this would be in a context recognized even by the *Slaughter-House* Court – "the right to use the navigable waters of the United States, however they may penetrate the territory of the several States;" 83 U.S. (16 Wall.) at 79-80 – makes this a particularly attractive vehicle for analysis and decision. More importantly, the question of whether public access for boating and fishing on navigable waters are such rights of national citizenship within the ambit of

the Privileges or Immunities Clause is inextricably linked with the other issues raised here.

III. The Fifth Circuit's ruling that recreational fishing and boating is not "commerce" and is not a protected use of the nation's waters, endangers the interests of millions of American boaters and anglers.

As noted above, the crucial error made in the decision below was its characterization that "Neither navigation nor commerce encompasses recreational fishing. Accordingly, the navigational servitude does not create a right to fish on private riparian land." Pet. App. 16-17 (citations omitted). Without unnecessarily broaching the merits, it is already apparent that this ruling is against the great weight of authority, not only of this Court but also of state supreme courts.

By equating the federal navigational servitude and public trust lands with strictly "commercial" values, the Fifth Circuit runs counter to the express holding of this Court in *Phillips Petroleum* "reject[ing] the dissent's assertion that 'the fundamental purpose of the public trust is to protect commerce'." 484 U.S. at 476 n.5 (quoting id. at 801) (citing *McCready v. Virginia*, 94 U.S. (4 Otto) 391, 395-97 (1877), for the proposition that "[b]ecause of the State's ownership of tidelands, restrictions on the planting and harvesting of oysters there have been upheld.").

But even if a commerce yard-stick is applied to the activity of sport-fishing on the waters in question here, it would likely be satisfied – had that analysis

been engaged in by the lower courts here. As discussed, supra, recreational boating and fishing accounts is an activity engaged in by between 35 to 45 million citizens annually. Revenues from boat, tackle, bait, and accessory sales and rentals, tourist accommodations (lodging and meals), marina and dockage fees, and other provision of amenities exceed $40 billion annually and contributed over $100 billion to the national economy.[3]

But, far more significantly, if the decision below is left unreviewed it will result in waters that have been typically open to appropriate public recreational access – during regular or seasonal flood stages, at predictable times of the year, and through otherwise navigable channels[4] – to be enclosed through fear of private land-owner trespass actions. More pertinently,

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[3] See Outdoor Industry Foundation, *The Active Outdoor Recreational Economy* (Fall 2006), available at http://www.outdoorindustry.org/images/researchfiles/RecEconomy_State%20final403.pdf?52 (visited May 14, 2008); U.S. Census Bureau & U.S. Fish & Wildlife Service, *National Survey of Fishing, Hunting, and Wildlife - Associated Recreation* (2006), available at http://www.census.gov/prod/2008pubs/fhw06-nat.pdf (visited May 14, 2008).

[4] Under no circumstances would *amici* be suggesting that a private land-owner must suffer a recreational easement across their dry property. That was never an issue in this case. See Pet. App. 3. When viewed in this fashion, any argument that this case actually involves a significant private property interest is purely illusory.

the problematic aspects of the decision below – as to the delimitation of mean high water in areas subject to regular flood, with regard the interplay of federal servitude/trust law and state property-law, and in relation to the significant constitutional interests of citizens in fishing and boating on the waters of this country – will result in substantial confusion for courts, not only on the lower reaches of the Mississippi River but in other regions of the nation. At stake in this case is nothing less than the continued public access and vitality for the great American water and fishing commonage.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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